Supreme Court, U.S.
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No. 91-1904

IN THE

Supreme Court of the United States

October Term, 1991

LEONARD L. FINZ,

Petitioner,

against

STUART A. SCHLESINGER; JULIEN, SCHLESINGER AND FINZ, P.C.; JULIEN AND SCHLESINGER, P.C.; JULIEN AND SCHLESINGER; STUART A. SCHLESINGER, doing business as Julien and Schlesinger P.C.; THE JULIEN AND SCHLESINGER EMPLOYEE RETIREMENT FUND; THE JULIEN AND SCHLESINGER P.C. EMPLOYEES RETIREMENT TRUST; PLAN DOE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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CORRECTING RESPONDENTS' MISSTATEMENT OF THE CASE.

Respondents portray this petition as one involving the propriety of an ERISA waiver, i.e., whether it was made knowingly and voluntarily under the "totality of circumstances test" espoused in a number of Circuit Court cases. This case is not, however, as respondents portray it. This petition does not involve the "totality of circumstances test." The narrow issue for determination may be stated as follows: (1) whether Finz, as an employee, was entitled to full *disclosure* from his employer of the ERISA plan to which he belonged (including of course any benefits owed to him), or whether the disclosure requirements of the ERISA Statute did not pertain to him because he was well educated, (2) whether the failure of the plan trustees to make disclosure and their intentional concealment of the plan and benefits vitiated Finz's waiver, and (3) whether the District Court's conclusion Finz was not entitled to disclosure

because he was well educated deprived him of Equal Protection.

We have no quarrel with the notion that education and background are relevant criteria to be employed in determining whether an ERISA "waiver" is knowing and voluntary; but only where the waiver agreement is plain on its face and nothing material has been hidden or withheld from the releasor. That is to say, in the absence of fraud.

Thus, had full disclosure of the plan and the benefits available to Finz been made in this case we would agree that Finz's educational status would be properly considered on the issue of whether his waiver was knowing or voluntary.

But intelligence, most respectfully, does not connote one is clairvoyant or has the ability to invariably discern truth from lie or the capacity to know and appreciate information which has *not* been disclosed and which, instead, has been intentionally withheld from one's knowledge.

Mr. Finz could have had the Intelligence Quotient of

Albert Einstein and still have been unaware of the benefits he was waiving. Without *disclosure* even the most intelligent employee cannot be expected to make a "knowing" waiver of ERISA benefits due to him. An employee's intelligence and background should have no bearing on whether he or she is entitled to disclosure before being said to have made a knowing and voluntary waiver. Setting aside as a separate subclass of employees, those who are "intelligent," to be treated differently with respect to the disclosure requirements of ERISA than those who are not intelligent, does not serve the legitimate purpose of protecting all employees and their families from the abuses of ERISA plan trustees; the purpose of the ERISA disclosure provisions.

POINT

THE WRIT SHOULD BE GRANTED ON THE GROUND FINZ WAS DENIED EQUAL PROTECTION

The Circuit Court found that the plan trustees "by repeatedly ignoring Finz' request for plan documents, shirked their responsibility." But the Court concluded that the defendants' failure to provide Finz with a summary description did not nullify his waiver. Why? Because it was clear to the Circuit Court that Finz "an astute lawyer, knew exactly the bargain he was making." On the other hand, the Court concluded, where there is great disparity in the education or bargaining power of the parties, the plan trustee's failure to provide a potential participant with requested information could be dispositive.

A sharp distinction was drawn by the Circuit Court between "astute lawyer" type employees and those less educated; as though those with greater education somehow

know or should know more about the ERISA benefits to which they are actually entitled under their particular plan, *even in the absence of disclosure*, than those who have less education.

Given the complexity of the ERISA laws, the Circuit Court's implied conclusion that Finz "knew" the bargain he was making regarding any ERISA benefits due to him because he was intelligent, is a *non sequitur*. Intelligence is not a substitute for information. Without disclosure of what is being waived, one cannot, we submit, properly conclude a waiver was "knowing" simply because the employee waiving was "smart" or "astute" or even "genius."

The Circuit Court thus created a subclass of employees (those astute, smart, lawyer-like or intelligent ones) and treated them differently from all others with respect to the disclosure requirements of ERISA.

In light of the fact the ERISA disclosure requirements are designed to serve the legitimate purpose of protecting all

employees and their families who may be participants or beneficiaries of ERISA plans from inadvertently or improvidently bargaining away any benefits provided by those plans, it was irrational for the Court to treat certain intelligent employees differently when it comes to disclosure. Intelligent employees are entitled to just as much information about their plan as less intelligent workers. A waiver of concealed or undisclosed ERISA benefits by an intelligent employee is just as unknowing as a waiver of concealed or undisclosed ERISA benefits by a less intelligent employee.

In short, all employees are entitled to disclosure. Whether, once disclosure is had, a particular employee understands what has been disclosed and thus has "knowingly" waived, may be assessed by taking the employee's intelligence into account. But it cannot be said that a waiver in any case is knowing where the ERISA plan and benefits available have been actively concealed by the plan trustee from the employee and where the employee

otherwise has no independent knowledge of the benefits being waived.

Accordingly, we embrace the standard expressed by this Court in *Pennell v. City of San Jose*, 485 US 1, 14 (1988) quoting from *Vance v. Bradley*, 440 US 93, 97 (1979), that it will not:

> ...overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.

It was arbitrary and unreasonable for the Court below to consider petitioner's intelligence is assessing whether he was entitled to "disclosure." The failure of the trustees to disclose should have been dispositive regardless of Finz's intelligence or background as a lawyer. By depriving Finz of

the right to be "informed" through disclosure simply because he was astute, the Court deprived him of the equal protection of the Laws to which he was absolutely entitled.

Respondents cite a number of cases in their brief, which address issues *not* raised by this petition. They, for example, place substantial reliance upon *Fare v. Michael C.*, 442 US 707, 725 (1929) and *Schneckloth v. Bustamonte* 412 US 218, 226 (1973), which were concerned with waivers of constitutional rights-not with one's entitlement to be informed of one's rights before making a waiver. Perhaps the more appropriate, more analogous case therefore is *Miranda v. Arizona* and its progeny.

In addition, respondents' citation of *Laniok v. Advisory Committee*, 935 F2d 1360, 1367-68 (2d Cir. 1991); *Leavitt v. Northwestern Bell Telephone Co.*, 921 F2d 160, 162 (8th Cir. 1990), *Gorman v. Brown-Forman Corp.*, 1992 U.S. App. LEXIS 13379 (11th Cir. June 15, 1992); *O'Hare v. Global Natural Resources*, 898 F.2d 1015, 1017 (5th Cir.

1990); *Bormann v. AT&T Communications*, 875 F.2d 399, 403 (2d Cir.), cert. denied, 493 U.S. 924 (1989); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 523 (3d Cir. 1988). See also *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 462-63 (9th Cir. 1989) and *Torrez v. Public Service Co.*, 908 F2d 687, 689 (10th Cir. 1990) is misplaced.

Those cases are concerned with the determination of whether a waiver was made knowingly and voluntarily. In none of those cases was the court presented with the issue of whether the waiving party was entitled to be informed of the rights or benefits being waived. The releases reviewed in the cases cited were plain on their face. The question was whether the waiving party understood the terms of the waiver.

That issue is not presented here.

Finz never had the opportunity to assess the actual facts. It could not properly be said that he made a "knowing"

waiver of facts never disclosed to him. He was unfairly singled out by the Circuit Court for different treatment regarding disclosure than all other employees because of his "intelligence" and "astuteness." This was an irrational distinction for the Court to draw in view of the purpose of the ERISA disclosure provisions.

CONCLUSION

By intentionally withholding pension plan information from Finz and otherwise failing to disclose to Finz the details of the pension plan in which he was a participant, the plan trustees shirked their responsibility to disclose under ERISA and the ERISA waiver signed by Finz was therefore a nullity, whether Finz was well educated or not.

The writ of certiorari should be granted.

Respectfully submitted

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Dated: August , 1992